

Message Text

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FM USMISSION USBERLIN

TO AMEMBASSY BONN PRIORITY

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C O N F I D E N T I A L SECTION 1 OF 2 USBERLIN 217

E.O. 11652: GDS

TAGS: PGOV, WB, GW

SUBJECT: ABORTION LAW--DRAFT BK/O TO ESTABLISH NEW
PROCEDURE ON CONSTITUTIONAL COURT DECISIONS

REFS: A) USBERLIN 100; B) BONN 1074

1. SUMMARY: ALLIED LEGAL ADVISORS REACHED AD REFERENDUM AGREEMENT WITH JUSTICE SENATOR KORBER FEBRUARY 4 ON PROCEDURE TO DEAL WITH CONSTITUTIONAL COURT DECISIONS. PROCEDURE, WHICH FOLLOWS CLOSELY THAT OUTLINED PARAS 3-4 REF A, WILL REQUIRE TRIPARTITE DISCUSSION IN BONN SINCE FRENCH ADVISE US THEY HAVE BEEN TOLD THEIR EMBASSY IS NEGATIVE ON PROJECT. KORBER, WHO WILL CONFIRM SENAT APPROVAL WITH GOVERNING MAYOR AND FULL SENAT, EMPHASIZED POLITICAL IMPORTANCE OF BEING ABLE TO DEMONSTRATE IN CONTROVERSIAL MATTERS SUCH AS ABORTION THAT BERLIN LAW WILL NOT DIVERGE FROM THAT OF FRG. END SUMMARY.

2. AD REFERENDUM PACKAGE HAS TWO ELEMENTS: BK/O IN WHICH ALLIES WOULD STATE COMPETENCE OF SENAT AND HOUSE OF REPRESENTATIVES TO PASS SPECIAL BERLIN LAW MODIFYING ANOTHER LAW IN FORCE IN BERLIN IN SAME MANNER AS THAT LAW HAS BEEN MODIFIED IN FRG, AND MODEL LAW, WHICH SENAT WOULD ADOPT TO SITUATION EACH TIME IT CONSIDERED IT
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NECESSARY TO INVOLVE PROCEDURE AS RESULT OF CONSTITUTIONAL

COURT DECISION WHICH HAD NO EFFECT IN BERLIN. BK/O WHICH IS INTENDED TO DEAL WITH TYPES OF PROBLEMS OUTLINED PAR 1 REF A IS IDENTICAL TO THAT REPORTED PARA 4 REF A EXCEPT FOR INITIAL PARAGRAPH WHICH WOULD READ:

BEGIN TEXT: IF, AFTER JANUARY 1, 1975, LEGAL PROVISIONS OF THE FEDERAL REPUBLIC OF GERMANY ARE ANNULLED, SUSPENDED OR MODIFIED BY A JUDICIAL DECISION HAVING GENERAL LEGAL FORCE IN THE FEDERAL REPUBLIC, AND THOSE LEGAL PROVISIONS HAVE BEEN OR ARE ADOPTED BY THE HOUSE OF REPRESENTATIVES, IT IS FOR THE SENAT, WITH A VIEW TO MAINTAINING LEGAL HARMONY WITH THE FEDERAL REPUBLIC, TO PROPOSE THAT THE HOUSE OF REPRESENTATIVES PROVIDE BY LAW THAT THOSE PROVISIONS ARE ALSO ANNULLED, SUSPENDED OR MODIFIED TO THE SAME EFFECT IN BERLIN . . . END TEXT.

3. SENAT ARGUED THAT IT WOULD BE SUFFICIENT TO PROVIDE FOR LEGISLATIVE ACT LESS THAN A LAW, FOR EXAMPLE A RESOLUTION, BUT ALLIED REPS INSISTED THAT LAW WAS REQUIRED TO MAKE CLEAR THAT IT WAS BERLIN RATHER THAN KARLSRUHE ACTION WHICH MODIFIED LAW IN FORCE IN BERLIN. SENAT ALSO SOUGHT TO RECAST FIRST PARAGRAPH TO READ AS ALLIED ORDER THAT SENAT AND HOUSE OF REPRESENTATIVES WOULD HAVE TO TAKE ACTION TO CONFORM BERLIN AND FRG LAW. KORBER STRESSED IN PARTICULAR CONCERN THAT, IF BK/O LEFT DISCRETION TO HOUSE, LEGISLATORS MIGHT DECIDE NOT TO PASS LAW EMBODYING CONTROVERSIAL CONSTITUTIONAL COURT DECISION THAT WAS UNPOPULAR IN BERLIN. ALLIED REPS STRESSED, HOWEVER, NECESSITY OF PRESERVING INDEPENDENT NATURE OF LEGISLATIVE ACTION IN BERLIN SO THAT ANY CHARGE THAT BUNDESTAG OR CONSTITUTIONAL COURT EXERCISED DIRECT STATE AUTHORITY OVER CITY COULD BE REBUTTED. IN END KORBER AGREED TO FORMULATION WHICH CLEARLY LEFT DISCRETION TO HOUSE AND WAS AMBIGUOUS ON SENAT DISCRETIONARY POWERS.

4. SENAT ALSO INDICATED FLEXIBILITY ON FORM OF MODEL LAW WHICH HOUSE OF REPRESENTATIVES WOULD BE EXPECTED TO USE BY AGREEING TO SPEAK NOT OF "EXTENSION" OF LEGAL CHANGE (I.E., EXTENSION OF CHANGE EFFECTED IN KARLSRUHE) BUT SIMPLY OF "AMENDMENT". LAW WOULD NORMALLY BE TITLED: CONFIDENTIAL

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"LAW ON THE AMENDMENT OF THE LAW ON ..." IT WOULD STATE IN PREAMBLE: "THE HOUSE OF REPRESENTATIVES HAS ADOPTED THE FOLLOWING LAW IN ACCORDANCE WITH BK/O ..." ARTICLE 1 WOULD PROVIDE THAT: "THE LAW ON ... IS VALID IN LAND BERLIN IN THE FOLLOWING MEASURE (MIT FOLGENDER MASSGABE): (IT IS ANNULLED TO THE EXTENT THAT)(ARTICLE ... IS SUSPENDED)(ARTICLE ... IS MODIFIED)..." ARTICLE 2 WOULD GIVE DATE FROM WHICH AMENDING LAW WOULD HAVE FORCE.

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5. COMMENT: IMMEDIATELY BEFORE MEETING WITH KORBER FEBRUARY 4, FRENCH LEGAL ADVISOR TOLD US HE HAD THAT MORNING RECEIVED TELEPHONE CALL FROM HIS EMBASSY (DE BOISSIEU) IN WHICH HE WAS TOLD THAT NO EFFORT SHOULD BE MADE TO FIND GENERAL RESOLUTION TO PROBLEM OF MAINTAINING CONFORMITY BETWEEN BERLIN AND FRG LAWS IN WAKE OF CONSTITUTIONAL COURT DECISIONS AND THAT AT MOST ALLIED MISSIONS SHOULD SEEK TO DEVELOP AD HOC PROCEDURE FOR DEALING WITH CONSTITUTIONAL COURT'S SCHEDULED FEBRUARY 25 DECISION ON ABORTION REFORM LAW. FRENCH EMBASSY DID NOT SPECIFY NATURE OF ITS DIFFICULTIES WITH EXERCISE THAT HAS BEEN UNDERWAY FOR MONTHS, BUT IMPLICATION WAS THAT EMBASSY CONSIDERED IT POLITICALLY PROVOCATIVE TO DEAL WITH CONSTITUTIONAL COURT DECISIONS IN ANY MANNER. FRENCH EMBASSY REP INDICATED THAT BRITISH AND US EMBASSIES ALSO SHARED FRENCH VIEWS. ACTING BRITISH LEGAL ADVISOR AND US LEGAL ADVISOR ADVISED FRENCH COLLEAGUE THAT THIS WAS CONTRARY TO THEIR UNDERSTANDING (REF B), AND FRENCH LEGAL ADVISOR, AFTER TELEPHONE CONVERSATION WITH HIS MINISTER, PARTICIPATED IN SUBSEQUENT MEETING WHILE EMPHASIZING TO KORBER NEED FOR FURTHER REVIEW BY AUTHORITIES.

6. IN VIEW OF AD REFERENDUM AGREEMENT WHICH HAS BEEN REACHED AND APPARENT FRENCH DIFFICULTIES, WE BELIEVE

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FORUM SHOULD NOW BE SHIFTED TO BONN. WE BELIEVE THAT COMBINATION OF BK/O AND SPECIAL BERLIN LAW WOULD, FOR REASONS SET FORTH PARA 5 REF A, ADEQUATELY PROTECT ALLIED LEGAL AND POLITICAL POSITION. TO REVERSE OURSELVES COMPLETELY AT THIS LATE DATE WOULD RAISE SERIOUS QUESTIONS IN MINDS OF SENAT, WHICH IS APPARENTLY PREPARED TO ACCEPT CONCEPT OF SPECIAL BERLIN LAW IN CAREFULLY DEFINED CIRCUMSTANCES--A CONCEPT PREVIOUSLY ANATHEMA TO IT. IRONICALLY THIS WAS FRENCH DEMAND OVER WHICH DISCUSSIONS BROKE DOWN LAST SUMMER AT TIME OF ORGINAL CONSTITUTIONAL COURT DECISION ON ABORTION REFORM LAW. FRENCH NERVOUSNESS OVER POLITICAL IMPLICATIONS OF BK/O SHOULD BE EASED BY FACT THAT PROPOSED PROCEDURE CAN BE DESCRIBED TO SOVIETS SHOULD OCCASION ARISE AS REASSERTION OF ALLIED AUTHORITY, I.E, WOULD REQUIRE CLEAR-CUT BERLIN ACT TO HARMONIZE LAW RATHER THAN RELY AS WE HAD PREVIOUSLY UPON DISCRETION OF INDIVIDUAL BERLIN JUDGES, WHO FREQUENTLY IN THEIR DECISIONS WOULD ACT AS IF CONSTITUTIONAL COURT DECISION WAS IPSO FACTO VALID IN BERLIN AND BINDING UPON THEM. (RELIANCE UPON JUDGES' DISCRETION IS, OF COURSE, IN ANY EVENT NOT ADEQUATE IN SITUATIONS WHERE INCREASINGLY ASSERTIVE CONSTITUTIONAL COURT ACTS BEFORE LAW HAS BEEN PASSED IN BERLIN OR AMENDS RATHER THAN SIMPLY ANNULS LA LAW.) END COMMENT.

7. ACTION REQUESTED: CLARIFICATION OF SITUATION WITH FRENCH EMBASSY WITH VIEW TO OBTAINING EARLY TRIPARTITE AGREEMENT TO AD REFERENDUM PACKAGE. WE WOULD NOT BE ABLE TO PROVIDE KORBER ALLIED VIEWS BEFORE FEBRUARY 11 SITTING OF SENAT AND IN ANY EVENT EARLY ENOUGH TO IMPLEMENT PROCEDURES OR DISCUSS ADDITIONAL MODIFICATIONS AS MIGHT BE REQUIRED BEFORE FEBRUARY 25.GEORGE

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